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JOHN T. FEY, Clerk

No. ~~307~~ 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Appellant,

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, and MILWAUKEE ROAD COMMUTERS' ASSOCIATION,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

BRIEF FOR APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

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September 26, 1956.

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PRELIMINARY STATEMENT.

Two motions to affirm the judgment of the District Court have been filed by Appellees, one on behalf of the Illinois Commerce Commission, hereinafter called the "Illinois Commission", and the State of Illinois, hereinafter, together with the Illinois Commission, jointly called the "State"; the other by the Milwaukee Road Commuters' Association, hereinafter called the "Association". The judgment which enjoined two orders of the Inter-

state Commerce Commission, and which Appellees assert presents no substantial question, is based on three misrulings by the Court, *i.e.*:

1. The Interstate Commerce Commission, hereinafter called the "Interstate Commission", can not exercise its powers under Section 13(4) of the Interstate Commerce Act (49 U.S.C. Section 13(4).) to prescribe intrastate fares until the state commission has first had an opportunity to sit in judgment of their lawfulness on the same basis and evidence as presented to the Interstate Commission (Dist. Ct. Opinion, Jurisdictional Statement, pp. 23, 24).

2. The Interstate Commission must find what contribution from the intrastate suburban traffic would constitute a fair proportion of the railroad's total income. (Dist. Ct. Opinion, Jurisdictional Statement, p. 18).

3. The evidence does not support a finding of the Interstate Commission that the prescribed fares are just and reasonable (Dist. Ct. Opinion, Jurisdictional Statement, p. 23).

1. ALLEGED REQUIREMENT THAT STATE COMMISSION HAVE OPPORTUNITY TO ADJUDGE LAWFULNESS OF FARES ON SAME EVIDENCE SUBMITTED TO INTERSTATE COMMISSION.

The State intimates that the District Court set aside the Interstate Commission's order solely for lack of necessary findings and evidence, and that the Court merely questioned Appellant's procedure before the Illinois Commission (pp. 6-9).[1] In direct contradiction to this sopo rific theory, however, are:

[1] Page numbers, unless otherwise specified, refer to the respective motions to affirm.

1. The insistence of the District Court (Dist. Ct. Opinion, Jurisdictional Statement, pp. 23, 24), the State (p. 7) and the Association (p. 16) upon the exclusive primary jurisdiction of the Illinois Commission over intrastate fares and its prior right to fix intrastate fares on the same evidence and basis as submitted to the Interstate Commission; and

2. The decree that the order fixing the intrastate fares was beyond the power of the Interstate Commission (Dist. Ct. Decree, Jurisdictional Statement, p. 25).

The State is completely unable (pp. 7, 8) to reconcile the holding of the District Court with that in *State of Florida* v. *United States*, 282 U.S. 194, quoted in the Jurisdictional Statement (p. 9), and ignored by the District Court, that the Interstate Commission has power to fix intrastate rates whether or not the state has first sat in judgment thereon.[2]

The exclusive authority of the Illinois Commission to determine the lawfulness under state law and the reasonableness *per se* of intrastate rates in no way conflicts with the exclusive authority of the Interstate Commission to determine whether the same rates discriminate against interstate commerce.

> "The plaintiffs and intervening petitioners have maintained that this court is without jurisdiction for the reason that the Illinois Commerce Commission reached a different conclusion upon the same facts and that there is now pending an appeal from its decision in the Circuit Court of Cook County.

[2] The Association merely suggests that the Florida case can be distinguished as "where one state challenges the rates of another" (p. 17). The Association fails to explain how the Interstate Commission's power over intrastate rates is enlarged when the Commission's jurisdiction is invoked at the request of a state rather than at the request of a carrier, or on its own motion.

> "It is sufficient for this court to point out that the result of that proceeding can in no way affect the jurisdiction of this court or the power and authority of the Interstate Commerce Commision. The Circuit Court of Cook County may sustain the Illinois Commerce Commission, but that makes no difference. The power and authority of the Illinois Commerce Commission and jurisdiction of the Circuit Court of Cook County are limited to interpreting and applying the statutes of the State of Illinois, creating and giving power to the Illinois Commerce Commission. It may very well be that, under the Illinois law, the Illinois Commerce Commission's report and finding are proper. Even if the Circuit Court of Cook County had already sustained the report of the Commission and the matter had been finally concluded the Interstate Commerce Commission would still have the power and authority under 49 U.S.C.A. § 13(4), to hear the petition in the instant case, and this court would have jurisdiction to determine whether or not the findings, conclusions and order of the Interstate Commerce Commission were founded upon and warranted by substantial evidence." *State of Illinois v. United States*, 101 Fed. Sup. 36, 40, affirmed 342 U.S. 930.

The foregoing quotation is from a unanimous opinion by another panel of judges, sitting as a three-judge court for the same district as the District Court herein, approving an Interstate Commission order fixing intrastate suburban fares of the Illinois Central Railroad in the Chicago suburban area.

Both the State (p. 7), and the Association (p. 17) purport to distinguish the *Illinois Central* case, as well as *State of North Carolina v. United States*, 128 Fed. Sup. 718, 724, affirmed 350 U.S. 805, as involving the Interstate Commission's jurisdiction over intrastate rates which are the subject of a court appeal from a state commission proceeding. If, as held in those cases, the

Interstate Commission is not deprived of power to remove discrimination against interstate commerce by intrastate rates prior to a final adjudication of their lawfulness under state law, even less reason exists to take away the Interstate Commission's power when no proceeding is pending, either before a court or a state commission.

The State speciously argues (p. 8) that if any effect is to be given to the very language of Section 13(3) of the Interstate Commerce Act requiring rates to be "made or imposed by authority of the State", the State Commission must be accorded the initial right to affix those rates. Section 13(3) does not require that any rate be made or imposed by authority of the State, but together with Section 13(4), provides that any rates so made or imposed which cause undue, unreasonable, or unjust discrimination against interstate commerce are unlawful and the Interstate Commission shall prescribe the rates to be charged which shall be observed by the carrier "the law of any state or the decision or order of any state authority to the contrary notwithstanding" (Jurisdictional Statement, pp. 45-47). No contention has ever been raised that Appellant's intrastate fares approved by the Illinois Commission in 1951, and found unlawful by the Interstate Commission, were not made and imposed by authority of the State of Illinois.

The State also argues that a carrier, if not required first to seek relief from the state commission on the same evidence and basis as submitted to the Interstate Commission, could file a reduced rate with the State Commission and then go to the Interstate Commission to have it set aside as discrimination against interstate commerce (p. 8). This argument, which assumes that any carrier would waste its money, time, and effort, in such a merry-go-round maneuver, is so frivolous as to be unworthy of the State.

Related to the question of whether the Interstate Commission has the power to fix Appellant's intrastate fares is the question raised by the State whether the scrupulous regards for the rightful independence of state governments which deter federal courts from enjoining state regulatory bodies (citing *Alabama Commission* v. *Southern Railway Co.*, 341 U.S. 341, 349) should equally operate to deter the Interstate Commission from using its authority to grant the extraordinary relief of a Section 13(4) petition in the instant proceeding (pp. 16, 17). The District Court, after discussing the procedure followed by Appellant before the Illinois Commission, concluded that justification for the exercise of the federal power to nullify state rates does not clearly appear from the record. (Dist. Ct. Opinion, Jurisdictional Statement, pp. 23, 24)

That the *Alabama* case has no application to a proceeding involving the exercise by the Interstate Commission of its power to fix intrastate rates under Section 13(4) is well expressed in the *Illinois Central* case, *supra*, *State of Illinois* v. *United States*, 101 Fed. Sup. 36, 40:

> "In the argument before this Court the case of *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U.S. 341, 71 S. Ct. 762, 767, 95 L. Ed. 1002, was urged as a recent case showing a different viewpoint on the problem of federal authority over intrastate activities. That case was not brought under the Transportation Act. No hearing occurred before the Interstate Commerce Commission under 49 U.S.C.A. § 13. The suit was one in which the plaintiff sought to go into a federal district court and enjoin the action of the Public Service Commission of the State of Alabama, which had entered an order refusing to permit the Southern Railway to discontinue certain trains. The court in a special footnote specifically stated: 'As the jurisdiction of the Interstate Commerce Commission under 49 U.S.C. §13(4), 49

U.S.C.A. § 13(4), has not been invoked for decision as to whether the continuance of this intrastate service constitutes an undue discrimination against interstate commerce we cannot, in this proceeding, consider any impact the order of the Alabama Public Service Commission might have on interstate commerce.'

"It is therefore clear that the court did not intend its decision in that case to alter or change in any way the principles that have been consistently followed in the interpretation of the National Transportation Act."[3]

Moreover, in the *Illinois Central* case it was made clear that:

"* * * it was within the power of the Interstate Commerce Commission, *and it was its duty*, having found upon substantial evidence the existence of an unjust discrimination against interstate commerce, caused by the surburban fares in question which had been made and imposed under authority of the State of Illinois, to prescribe the rate or fare to be charged in the future in order to remove such unjust discrimination." (Emphasis supplied) (*State of Illinois v. United States*, 101 Fed. Sup. 36, 47).

It must, therefore, be concluded, contrary to the opinion of the Disfrict Court and Appellees, that:

1. The Interstate Commerce Commission had the power under Section 13(4) of the Interstate Commerce Act to fix Appellant's intrastate fares without regard to whether the Illinois Commission had first sat in judgment thereon on the same or different evidence than submitted to the Interstate Commission.
2. The Interstate Commission had a duty to exercise such power to eliminate undue, unreasonable, or un-

[3] Interstate Commerce Act.

> just discrimination against interstate commerce, which upon investigation it found to exist. "

These conclusions should make unnecessary a response to the remarks by both the State (pp. 3, 8, 9) and the Association (pp. 16, 17) indicating a willful withholding by Appellant of certain evidence from consideration by the Illinois Commission in the prior proceeding before it. To expunge any inference of bad faith, or that Appellant indulged in a sham proceeding before the Illinois Commission, the facts relating thereto are here set forth, as shown in the record before the Interstate Commission.

Contrary to the State's assertion (p. 2), Appellant did not in its petition to the Illinois Commission in July, 1952, specify any percentage of fare increase sought. Instead it asked for an increase which, together with savings from discontinuance and consolidation of trains for which authority of the Illinois Commission was concurrently sought, would eliminate Appellant's out-of-pocket loss (ICC Report, Jurisdictional Statement, p. 30). Appellant offered evidence before the Illinois Commission for which the total time required was not over two days. The Illinois Commission, however, permitted the hearings to drag out, over Appellant's objections, until July, 1953. The evidence showed an out-of-pocket loss at the time of the hearings of over one million dollars a year, but despite the pressing need of Appellant for relief from its huge loss, the Illinois Commission refused Appellant a decision until November, 1954, one year and four months after the close of hearings, despite repeated unfavorable comment for lesser delays in other proceedings by both state and federal courts (*Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587; *Chicago B. & Q. R. Co. v. Illinois Commerce Commission, et al.*, 82 Fed. Sup. 368, 375; *Pullman Co. v. Illinois Commerce Commission*, 390 Ill. 40, 60 N.E.

2nd 232). It then denied Appellant the right to discontinue any of its money-losing trains, and denied Appellant any fare increase. It attempted to justify the denial by ignoring approximately $290,000 of Chicago Union Station expenses of which Appellant would be relieved if the suburban service were discontinued, and by finding that through dieselization Appellant could effect a million-dollar annual savings and thereby supposedly eliminate its loss.

The State contends that items of depreciation and maintenance of way expenses, totaling over $250,000 of the out-of-pocket loss of $306,038 found by the Interstate Commission, were withheld by Appellant from its case before the Illinois Commission (pp. 2, 3). Of this $250,000 approximately 62% or over $155,000 (ICC Report, Jurisdictional Statement, p. 32) represents depreciation of modern diesel locomotives assigned to suburban service subsequent to the hearings before the Illinois Commission. (This is also an expense that the Illinois Commission failed to consider in computing Appellant's dieselization savings).

The remaining expenses of $95,000, representing depreciation of coaches and a portion of maintenance of road and track expenses which vary with use, were presented to the Interstate Commission in accordance with the formula for computing costs of suburban service published by the Interstate Commission's Bureau of Transport Economics and Statistics. This formula treats out-of pocket expenses of suburban service as those of which a carrier *over a period of time* would be relieved if the service were discontinued. In view of its million-dollar a year loss based upon *immediately* relievable expenses alone, and the substantial fare increase then necessary

to eliminate such loss, Appellant did not ask to recover the relatively small items of expense that over a period of time were relievable.

Inasmuch as the variance in evidence before the Interstate Commission from that submitted to the Illinois Commission occurred principally because of changes during the long two-year and four-month period that Appellant vainly sought action on its petition to the Illinois Commission, the criticism directed toward Appellant by the District Court, the Association, and, strangely, the State itself, is entirely unwarranted.

2. ALLEGED ABSENCE OF NECESSARY FINDING TO SUPPORT INTERSTATE COMMISSION'S ORDER.

The State describes as "basic and necessary", a finding of the amount of contribution from intrastate traffic which would constitute a fair proportionate share of the carriers' total income (p. 11). None of the ensuing quotations support the statement. The quotations do, however, emphasize that intrastate traffic must bear a fair proportionate share of the cost of maintaining an adequate railway system. Had the sentence quoted by the State (p. 11) from *King* v. *United States*, 344 U.S. 254, 270, been completed, it would be seen that the full obligation includes a contribution of a

> "fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of the property directed to the transportation service, both interstate and intrastate."[1]

In *Wisconsin* v. *Chicago B. & Q. R. Co.*, 257 U.S. 563, cited by the State, necessary findings were not discussed.

[1] See also **North Carolina v. United States**, 325 U.S. 507, 520; **United States v. Louisiana**, 290 U.S. 70, 75.

In *Florida* v. *United States*, 282 U.S. 194, the Court did declare invalid part of an order of the Interstate Commission fixing intrastate fares for want of findings as to—

1. The revenue which had been derived by the carrier from the traffic in question.
2. The revenue which could reasonably be expected under the increased rates.
3. Whether the alteration of the intrastate rates would produce or was likely to produce additional income necessary to prevent a burden upon the carriers' interstate revenue and maintain an adequate transportation system. (282 U.S. 194, 214, 215).

All of these findings or their equivalent were made in the instant proceeding (ICC Report, Jurisdictional Statement, pp. 34, 36). No reference is made by the Court in the *Florida* case to the need of any finding concerning what amount of contribution is necessary as a fair proportionate share of the carriers' total income.

In *North Carolina* v. *United States*, 325 U.S. 507, the Court also set aside an Interstate Commission order fixing intrastate fares, for want of adequate findings. The Court found insufficient the Interstate Commission's "conclusion" that intrastate traffic was not contributing its fair share of the revenue required to render adequate and efficient transportation service. It indicated that specific findings by the Interstate Commission were necessary, *i.e.*, that the intrastate rates were less than compensatory or insufficient to cover the full cost of service and that the maintenance of the prescribed rates were necessary to the operation of a nationally efficient and adequate railway system (325 U.S. 507; 514, 515). Findings of this nature were made by the Interstate Commis-

sion in the present proceeding (ICC Report, Jurisdictional Statement p. 36).

As stated in *King* v. *United States*, 344 U.S. 254, 274, the Court in the *North Carolina* case (325 U.S. 507) mentioned, but did not make indispensable, the findings in dollars which were absent, including the finding "as to what contribution from intrastate traffic would constitute a fair proportion of the railroads' total income"; and in the *King* case itself, no such finding was required.

The Association attempts to distinguish the *King* case by claiming that an express finding was made therein as to the relationship between the revenue produced by intrastate rates, and the railroads' total income (p. 13). In its report in that proceeding, 278 I.C.C. 41, the Interstate Commission made no finding whatever concerning the total revenues of the railroads involved, individually or collectively. On page 65, it did refer to their combined net railway operating income, and the additional revenues from the increased rates sought. In the present proceeding the Interstate Commission also made findings as to Appellant's net railway operating income, the additional revenue from the increase in fares sought, as well as the additional revenue from the increased fares prescribed (ICC Report, Jurisdictional Statement, pp. 31, 34, 35).

The Interstate Commission, therefore, has made the findings declared essential in the cases cited by Appellees, in none of which cases was a finding required as to what contribution from intrastate traffic would constitute a fair proportion of a carrier's income.

Even were a finding of such nature required, the alternative finding which both the Court (Dist. Ct. Opinion, Jurisdictional Statement, p. 18) and the State (p. 12) have indicated would be sufficient, *i.e.*, that the revenue

produced by the prescribed intrastate fares will constitute not more than a fair proportion of Appellant's total income, has in effect been made. The Interstate Commission found (ICC Report, Jurisdictional Statement, pp. 36, 37) that the intrastate fares prescribed—

> "are necessary so that the travel thereunder may make a fair contribution toward respondent's indirect costs and return on investment, and to enable it, under honest and efficient management, to provide adequate and efficient service at the lowest cost consistent with the furnishing of such service."

How obviously short the prescribed fares fall of exceeding a fair proportion of Appellant's income will be seen from the discussion in the following section of this reply.

3. ALLEGED LACK OF EVIDENCE TO SUPPORT A FINDING THAT PRESCRIBED FARES ARE JUST AND REASONABLE.

The Association at the outset of its argument (p. 9) tries to restrict the scope of the Court's review on this appeal by a quotation from *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490, 491, stating that the determination of whether substantial evidence exists to support a finding of the National Labor Relations Board has been placed in the keeping of the Court of Appeals. The Association then decides that doctrine is applicable to the present proceeding. Apparently no notice was given the companion case of *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340 U.S. 498, 502, 503, decided the same day, wherein the Court said:

> "Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject

that of the court below. But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. 'The jurisdiction of the court [of appeals] shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari . . .' Taft-Hartley Act § 16 (e), 61 Stat. 148, ch. 120 29 U.S.C. (Supp. III) § 160 (e). Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393, 67 L. ed. 712, 714, 43 S.Ct. 422; Revised Rules of the Supreme Court of the United States, Rule 38(5)."

It is the function of this Court in appeals from three-judge court decisions enjoining or affirming orders of the Interstate Commission, to determine whether there was substantial evidence to support the Interstate Commission's findings. Where the order of the Interstate Commission is supported by substantial evidence, this Court will reverse a decree by the District Court enjoining the order. *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U.S. 541, 547, 548; *United States* v. *American Sheet and Tin Plate Co.*, 301 U.S. 402, 411.[5]

[5] As stated in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 477:

> "In the latter case, the court said,
> "We are unable to say that the findings in respect of the individual plants lacked support in the evidence. We are, therefore, bound to accept them and to hold the orders lawful."

"'substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 229, 83 L. ed. 126, 149, 59 S.Ct. 206. Accordingly, it 'must do more than create a suspicion of the existence of the fact to be established. . . . It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300, 83 L. ed. 660, 665, 59 S.Ct. 501."

There was, in addition to the evidence of fares of the Chicago and North Western Railway, which serves territories between and adjacent to territories served by Appellant, abundant evidence from which the Interstate Commission could find that the prescribed fares are just and reasonable. The State attempts to dismiss such evidence by arguing that it can not sustain the assumption of jurisdiction by the Interstate Commission (p. 15). The question, however, of whether the Interstate Commission has jurisdiction is entirely distinct from whether the fares it has prescribed are just and reasonable.

The Interstate Commission's report itself shows there was comprehensive evidence before it of the out-of-pocket and fully distributed costs of performing the service; equipment required by the suburban operation; fares in effect on other railroads serving the Chicago area; non-suburban fares of Appellant; and percentage increases in earnings of industrial employees more than double the increases in Appellant's fares for the like period of 1940—1954 (ICC Report, Jurisdictional Statement, pp. 31, 33, 34, 35, 36).

In addition the Interstate Commission had before it evidence showing higher fares for slower service via other carriers between points served jointly with Appellant; the schedules of trains, the trackage, maintenance and repair facilities, passenger stations, and trains crews utilized in the suburban operation; the conflict of suburban operations with through passenger and freight operations; and the large amount of unproductive time of equipment and personnel incident to moving thousands of people within the short periods of the morning and evening rush hours over distances ranging between 3 and 73 miles (Transcript of testimony before Interstate Commission, pp. 8-24).

It is thus patent that the Interstate Commission had much more before it than merely the fares of the Chicago and North Western Railway upon which to base its expert judgment in fixing Appellant's fares. In the exercise of that judgment, however, it restricted Appellant's fares to the North Western level. Appellant properly took the position before the Interstate Commission that such increase was substantially less than the evidence justified, as reflected by the statement of its attorney quoted by the District Court (Dist. Ct. Opinion, Jurisdictional Statement, p. 22) and the State (p. 10). Appellant's present position, seeking to preserve the partial relief granted, is no less consistent and much more understandable than the State's position that Appellant is not entitled to any fares on the North Western level, especially in view of the State's concession before the Interstate Commission that—

> " * * * perhaps the allowance of a minimum fare of 25 cents per trip and one-way fares based on approximately a 3-cent mile could be established to allow respondent 'similarity' with the North Western." (ICC Report, Jurisdictional Statement, p. 36).

It is apparent from the District Court's opinion that it was under the misapprehension that the fares prescribed would be "paying all of the costs of suburban service and, in addition, making a contribution to the other costs of the railroad * * *". (Dist. Ct. Opnion, Jurisdictional Statement, pp. 19, 20). The true cost of transportation consists of both direct and indirect expenses and includes not only the out-of-pocket or relievable costs, but also a fair allocation of costs incurred jointly with other traffic.

> "We say this, for we entertain no doubt that, in determining the cost of the transportation of a particular commodity, all the outlays which pertain to it must be considered. We find no basis for distinguishing in this respect between so-called 'out-of-pocket costs,' or 'actual' expenses, and other outlays which are none the less actually made because they are applicable to all traffic, instead of being exclusively incurred in the traffic in question." (*Northern Pacific Ry. Co.* v. *North Dakota*, 236 U.S. 585, 596.)

In addition to its out-of-pocket costs, the uncontested evidence shows additional costs fairly allocable to the suburban service of over $1,100,000 per year. The fares prescribed would make a contribution of but approximately $77,000 to these costs. There is no basis, therefore, for any concern that the prescribed fares will enable Appellant to recoup even the full cost of the suburban service, much less a return on investment or contribution to other costs.

The Interstate Commission's report is unfairly characterized by the State as taking the position that suburban fares should be fixed on the basis of "how much the traffic will bear" (p. 15). The Interstate Commission correctly

stated, in effect, that to the extent the suburban service fails to meet all of the out-of-pocket costs as well as the indirect costs of the suburban operation, to the extent it reasonably can, it increases Appellant's passenger deficit and results in undue burden upon its freight operation. Such a position in no way conflicts with the statement in *Dayton Goose Creek Ry. Co.* v. *United States*, 263 U.S. 456, 483, that a carrier can not justify unreasonably high rates on intrastate traffic to meet losses on its interstate business.

The State (p. 10) also attempts to justify the Court's conclusion that without sufficient evidence of comparability in operation, there is no ground for fixing the Milwaukee Road's fares at the North Western level or for finding that the resulting fares are just and reasonable. The State contends that the Interstate Commission itself has recognized that there must be some similarity of operation to justify comparability of fares, citing *Commutation and Multiple Fares between Illinois and Wisconsin*, 288 I.C.C. 15.[6] It is difficult to imagine a case less helpful to the State's position. The Interstate Commission therein prescribed the same interstate suburban fares in 1953 for the North Western, a steam and diesel-operated railroad, and the Chicago North Shore and Milwaukee Railway, an electric interurban line. In so far as the report discusses operating conditions, *i.e.*, equipment and power used, it indicates far less similarity between those two

[6] The only additional authority that the State produced was a State Court case dealing with the determination of the reasonableness of rates under state law, and involved whether the Illinois Commission could disregard as immaterial the question whether the compared rates were for a switching or line haul service. **Moline Consumers Coal v. Illinois Commerce Com.**, 353 Ill. 119, 126.

lines than exists between the Appellant and the North Western (288 I.C.C. 15, 16, 17, 26).

Not only did the Interstate Commission prescribe the same interstate fare levels for the North Western and the North Shore, but the Illinois Commission, in a related proceeding, and in a almost identically worded order, prescribed the same levels of intrastate fares. (ICC Report, Jurisdictional Statement, p. 29; unreported order, Nov. 10, 1954, Illinois Commission Dockets 40349 and 40429). The orders of the Interstate Commission, which now finally accord Appellant the same level of fares granted in 1953 to the North Western and North Shore, have largely corrected the lack of uniformity of fares mentioned by the State (p. 10) in the areas north and northwest of Chicago served by the three carriers.

4. INTERSTATE FARES.

The only justification offered by the Association for the setting aside by the District Court of the Interstate Commission's order fixing Appellant's interstate fares is that such fares were only incidentally involved, and Appellant's request for an increase thereof was conditioned on a like increase in the intrastate fares (p. 3). The interstate and intrastate fares were ordered and placed into effect independently of each other. The Interstate Commission's order of November 24, 1955 fixed only the interstate fares (Jurisdictional Statement, pp. 41, 42) which became effective January 29, 1956. The Interstate Commission's order of March 2, 1956 fixed only intrastate fares (Jurisdictional Statement, pp. 43, 44) which became effective April 20, 1956.

The record before the Interstate Commission in the instant proceeding shows that in 1955 most of the North Western's and all of appellant's suburban trains were diesel-powered. (Transcript of testimony before Interstate Commission, p. 367, 368).

The State's arguments (p. 16) are also without merit. First, Appellant did not join in the motion to correct the Court's order, not because it thought unsubstantial the setting aside of its interstate fares, but because it felt that more than a mere clerical error was involved. Second, in addition to the one suburban train in each direction serving the Wisconsin points, two additional through trains in each direction, as shown by the record before the Interstate Commission, carry passengers at the fares involved in this proceeding between Walworth and Chicago. Third, the State's assumption that the interstate fares must fall or stand with the intrastate fares, ignores the fact that the first two grounds for the District Court's order (p. 2 *supra*) have absolutely no relation to the interstate fares. As to the third ground, the District Court itself makes clear that the question was whether the evidence before the Interstate Commission supports its findings that the *intrastate* fares which it has prescribed will be just and reasonable for the future (Dist. Ct. Opinion, Jurisdictional Statement, p. 21). Hence, there is no basis in the District Court's opinion for its interference with the Interstate Commission's plenary power to fix interstate fares.

CONCLUSION.

Appellant's Jurisdictional Statement has set forth the substantial questions involved in this appeal, which affect the determination of rights of carriers, their passengers, and also their shippers who are saddled with passenger deficits, throughout the country. The decision of the District Court would condone the device employed by the Illinois Commission of wilful procrastination for more than two years in disposing of a carrier's petition for relief, and then objecting to the grant of relief under federal law because the evidence before the Interstate Commission, reflecting changes occurring during the carrier's long wait, varies from that presented to the State Commission. Even were a State Commission conscientiously inclined to dispose of a petition for relief within a reasonable time, both the decisions of this Court, and of another panel of judges for the same district as the District Court herein, have declared that Section 13(4) of the Interstate Commerce Act does not tolerate the delay incident to a prior determination of entirely different issues under state law.

Appellant has further shown in its Jurisdictional Statement the potential confusion and disruption of the nation's rate structure if comparability of operating conditions is to become a prerequisite for uniform fare levels among carriers. Appellant has also shown that the District Court has failed in its duty to determine if there was any evidence acceptable to reasonable minds upon which the Interstate Commission could base its orders, by patently ignoring a substantial part of the evidence before the Interstate Commission. Finally, the District

Court has improperly enjoined orders of the Interstate Commission for the absence of a finding which this Court has refused to require.

The questions submitted to this Court are substantial. Appellant requests that the motions of Appellees to affirm be denied and that this court note probable jurisdiction.

Respectfully submitted,

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